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SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 331

JULIAN N. FRISBIE, WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN,
PETITIONER,

vs.

SHIRLEY COLLINS

On writ of certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

I

Opinion of Court Below.

The opinion of the court below is reported as *Collins v. Frisbie, Warden*, 189 F. 2d 464, and it appears in the printed transcript of record (14) together with a dissenting opinion written by Circuit Judge Miller (20). The findings of fact and conclusions of law of the district

court (order denying writ of habeas corpus) appear at pages 11-12 of the record. [1]

II

Jurisdiction.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered May 28, 1951 (14), and a petition (22) for rehearing and other relief, filed June 15, 1951, was denied June 25, 1951 (29). The petition for a writ of certiorari filed September 17, 1951 was granted November 5, 1951 (30) in an order transferring the case to the summary docket. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1), 1948 revision.

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[1] Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief refer to pages of the printed transcript of record.

III

The Questions Presented.

1.

Where a person accused of murder under valid process issued from a Michigan circuit court of competent jurisdiction,[2] has been duly convicted of such offense in the "first degree,"[3] after a fair and impartial trial by jury, during which all fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment were preserved, must it be held, as the court below decided, 189 F. 2d 464, that the jurisdiction of the Michigan trial court would be rendered void ab initio upon proof of the fact alleged in defendant's petition for writ of habeas corpus (3-5), that prior to his trial such accused person had been unlawfully transported from the state of Illinois into the state of Michigan, following his illegal arrest, detention, maltreatment and forcible kidnapping by two Flint, Michigan, police officers, all in violation of the Federal Kidnapping Act, 18 U.S.C. § 1201, and is a

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[2]

Under Michigan Law, prosecution for felony is instituted in circuit court upon filing an information by the prosecuting attorney, Mich. Comp. Laws 1948, § 767.40, Mich. Stat. Ann. (Henderson) § 28.980, after a proper return is filed by an examining magistrate following the issuance of his warrant authorizing arrest, a preliminary examination or waiver thereof by the accused, and a determination therefrom that an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith and binding him over for trial, Mich. Comp. Laws 1948, § § 766.1, 766.3, 766.4, 766.13, Mich. Stat. Ann. (Henderson), § § 28.919, 28.921, 28.922 and 28.931.

[3]

Mich. Penal Code, §§ 316-318, Mich. Comp. Laws 1948 §§ 750.316-750.318, Mich. Stat. Ann. (Henderson) §§ 28.948-28.950.

state prisoner so convicted of murder, subject to discharge on a writ of habeas corpus issued from a district court of the United States pursuant to 28 U.S.C. § 2254?[4]

2.

Whether in the pending cause, the applicant for a writ of habeas corpus from a federal district court, can properly be deemed to have "exhausted the remedies available in the courts of the state," 28 U.S.C. § 2254, or whether he has pleaded exceptional circumstances of peculiar urgency sufficient to require prompt federal action, it appearing (22-25) that while Shirley Collins has sought relief in the Michigan courts by moving for new trial and applying to the Supreme Court of the State of Michigan for leave to appeal, as well as for writs of mandamus and habeas corpus, he has never in any of such state proceedings, raised the question arising from the manner in which he now alleges, he was transported by Michigan state police officers from Illinois into Michigan, nor has he ever claimed in the courts of Michigan such a denial of Due Process guaranteed by the Fourteenth Amendment.

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[4]

This question may also, we think, be premised upon a fair inference drawn from respondent's subsequent conviction by a jury, that he had fled from Michigan's justice and was found in Illinois.

IV

Statute and Constitutional Provisions Involved

1

Federal Constitution,

Article IV, § 2 (2):

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Due Process Clause, 14th Amendment:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

2

Federal Laws:

Federal Kidnapping Act:[5]

"(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlaw-

[5]

47 Stat. 326; 48 Stat. 781; 18 U.S.C. § 1201.

fully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

(b) The failure to release the victim within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away shall create a rebuttal presumption that such person has been transported in interstate or foreign commerce.

(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished as provided in subsection (a). June 25, 1948, c. 645, 62 Stat. 760."

Interstate Rendition of Fugitive from Justice:[6]

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or

[6] 62 Stat. 822; 18 U.S.C. § 3182.

Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged. June 25, 1948, c. 645, 62 Stat. 822."

Habeas Corpus — State Custody:[7]

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented. June 25, 1948, c. 646, 62 Stat. 967."

[7] 62 Stat. 967; 28 U.S.C. § 2254.

V

Statement of the Case.

On the 29th day of April, 1942 (22), following trial by jury in the circuit court for the county of Genesee, State of Michigan, Shirley Collins was duly convicted of murder in the first degree,[8] and sentenced to life imprisonment. Throughout such proceedings he had the benefit of counsel.

Eight years, ten months, and approximately 14 days thereafter, on the 14th day of March, 1950, the defendant (so designated for clarity), without first raising the question in any court of the State, filed in the District Court of the United States for the Eastern District of Michigan his petition (1-3) for a writ of habeas corpus,[9] on the ground that Michigan lacked jurisdiction to try him for a criminal offense, or hold him under the life sentence imposed, because prior to arraignment and trial he had been kidnapped by Michigan officers in the State of Illinois, brutally treated and transported in interstate commerce to the state of Michigan, contrary to the Federal Kidnapping Act[10] and without appropriate proceedings in extradition.

From an order (11) denying the writ, the defendant duly appealed (12), and the United States Court of Appeals

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[8]

Michigan Penal Code, § 316, CL 1948, § 750.316, Mich. Stat. Ann. (Henderson) § 28.548.

[9]

28 U.S.C., § 2254.

[10]

18 U.S.C., § 1201.

for the Sixth Circuit, in a judgment (13) entered the 28th day of May, 1951, reversed the judgment of the District Court and remanded the cause for further proceedings in accordance with an opinion (14-20) filed the same day, *Collins* v. *Frisbie*, 189 F. 2d 464, one judge dissenting (20), 189 F. 2d at 468.

The prevailing opinion held, in substance, (1) that where it is alleged in a petition for habeas corpus that petitioner had been illegally arrested and maltreated in Chicago, Illinois, by two Michigan police officers and he had thereafter been forcibly kidnapped by them and returned to Michigan and illegally imprisoned, the allegations of the petition charged a federal offense against state officers who kidnapped and abducted petitioner, and petitioner would be entitled to a hearing upon those allegations, and, in event averments were proved, to discharge; (2) that a State may not lawfully try, convict and punish a person brought within its territorial confines by force and violence exercised by its officers in violation of a federal criminal statute; and (3) under *Darr* v. *Burford*, 339 U.S. 200, a previous denial of a petition for certiorari from this Court as a condition precedent to an application for writ of habeas corpus addressed to the district court is unnecessary *in this case*, because of such "exceptional circumstances" found to exist here as to require prompt federal action (20, note 1), 189 F. 2d at 468, note 1.

And the Court, in note 1 (20), made the following suggestion:

> "We think, therefore, that the course of this case should not be arrested on technical, procedural grounds, but should be expedited by petition for certiorari to the Supreme Court (of the United States) for prompt review of our decision, if the highest tribu-

nal deems it advisable to grant such petition. This would be the most expeditious route for final solution of what would seem to be an urgently practical problem in the administration of justice in certain criminal cases."

The dissenting opinion of Judge Miller was based on the ground it did not appear that the applicant had exhausted his state remedies, § 2254, Title 28, U. S. C., *Darr* v. *Burford, supra,* 339 U. S. 200, *Ex Parte Hawk,* 321 U. S. 114; that the petition contains no allegation explaining the delay from February 21, 1942, the date of arrest, to March 14, 1950, when the petition for habeas corpus was filed, makes no showing of "exceptional circumstances of peculiar urgency," and does not explain why the regular and ordered procedure in the State Court should not be followed before asking for federal intervention; the application came too late, since the point now raised was available as a defense in the state court trial, but was not there raised or relied upon by appellant. "Even if not treated as waived, it has not as yet been presented in any State court proceeding available to the applicant."

A petition (22) for rehearing and other relief, filed on the 15th day of June, 1951, was denied (29) June 25, 1951.

The petition for rehearing and other relief alleges in substance and effect that the defendant had never, in the trial court, or in the Supreme Court of the State of Michigan, raised the point that the court of trial lacked jurisdiction because of illegal transportation from Illinois to Michigan without proceedings in extradition (22-29), although defendant had on numerous occasions raised other questions of alleged error, in mandamus proceedings, on application for leave to appeal, and in petition for writ of habeas corpus.

The petitioner sought (24) and was denied (29) an order affording him reasonable time to obtain and file exemplified copies of the records of the State Courts, granting a rehearing, or "in the alternative, that the order remanding the cause to the court below, provide that the District Judge, in carrying out the mandate of this Court be permitted to consider the question whether the petitioner for habeas corpus has exhausted his state remedies."

VI

Summary of the Argument.

First:

Michigan's jurisdiction to accuse, try, and upon conviction punish Shirley Collins for murder, was not impaired by the alleged misconduct of over-zealous police officers in arresting, maltreating and transporting respondent from the asylum State of Illinois to the State of Michigan for the sole purpose of compelling him to face a fair and impartial trial under adequate constitutional safeguards:

1. The doctrine is sustained in an unbroken line of this Court's decisions,[11] followed, with possibly one excep-

[11]

Ker v. Illinois, 119 U.S. 436; Mahon v. Justice, 127 U.S. 700; Cook v. Hart, 146 U.S. 183; Lascelles v. Georgia, 148 U.S. 537; In re Johnson, 167 U.S. 120; Pettibone v. Nichols, 203 U.S. 192.

tion,[12] by federal courts of appeals,[13] and by courts of last resort in the several states.[14]

2. The principles which controlled such decisions were not vitiated by enactment of the Federal Kidnapping Act, 47 Stat. 326, or its subsequent amendment, 48 Stat. 781, 18 U.S.C. § 1201, and applicability of its provisions here is extremely doubtful.[15]

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[12]

So far as we can ascertain, the court below stands practically alone; Brown v. Frisbie, 178 F. 2d 271; and the cause now reviewed, Collins v. Frisbie, 189 F. 2d 464.—Cf. Robinson v. United States, 144 F. 2d 392, involving the Removal Statute, 18 U.S.C. § 591, and holding, inter alia, that the presence of the defendant in the court of trial gave it complete jurisdiction over his person, regardless of how his presence was secured; affirmed, 324 U.S. 282, without discussing this point.

[13]

Please see, e.g., United States ex rel, Voigt v. Toombs, 67 F. 2d 744; cert. denied, 291 U.S. 686; Stamphill v. Johnson, 136 F. 2d 291; cert. denied, 320 U.S. 766; Sheehan v. Huff, 142 F. 2d 81; McMahan v. Hunter, 150 F. 2d 498; cert. denied, 326 U.S. 783; Sweet v. Howard, 155 F. 2d 715; Chandler v. United States, 171 F. 2d 921; cert. denied, 336 U.S. 918; Pierce v. Smith, 175 F. 2d 193; cert. denied, 338 U.S. 838; and Gillars v. United States, 182 F. 2d 962.

[14]

Such decisions are collated in 165 A.L.R. 947. Please see, for further example, State v. Moore, 43 Del. 509, 519, 50 A 2d 791, 793; People v. Ragen, 396 Ill. 554, 72 NE 2d 311; In re Greenough, 116 Vt. 277, 75 A 2d 569, 572. And Michigan has considered her self bound by the decisions of this Court, People v. Mahler, 329 Mich. 155, 156, while Nebraska has overruled an early decision, Cf. Re Robinson, 29 Neb. 135 with Jackson v. Olson, 146 Neb. 885, 22 NW 2d 124, 165 A.L.R. 982.

[15]

Gooch v. United States, 297 U.S. 124; Robinson v. United States, 324 U.S. 282; and Chatwin v. United States, 326 U.S. 455, 462, 463.

3. The State of Michigan, in trying Shirley Collins for murder, did not deprive him of his liberty without due process of law in violation of the Fourteenth Amendment: (a) all magisterial proceedings were regular; (b) he was accused under valid process issued from a court of competent jurisdiction; (c) he had the assistance of counsel for his defense, a speedy and public trial by an impartial jury, was confronted with the witnesses against him, and possessed the right to have compulsory process for obtaining witnesses in his favor, Mich. State Constitution, Article II, § 19. Moreover, following conviction, he was afforded corrective process to cure any error committed during the trial.[16]

Second:

Since the applicant for a writ of habeas corpus from the District Court of the United States, was in custody pursuant to the judgment of a State court, since he failed to show he had "exhausted the remedies available in the courts of the State," 28 U.S.C. § 2254, and since he did not plead exceptional circumstances of peculiar urgency sufficient to require prompt federal action, he was not lawfully entitled to such a writ:[17]

1. He did not raise the question in the trial court and, under a decision of the Supreme Court of Michigan, *In re Reno*, 321 Mich. 497, he might reasonably be deemed to have waived the point.

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[16]

De Meerleer v. Michigan, 329 U.S. 663; Whalen v. Friable, 185 F. 2d 607.

[17]

Ex Parte Hawk, 321 U.S. 114; Darr v. Burford, 339 U.S. 200.

2. Although afforded opportunity, respondent neglected to make such a claim in subsequent applications to the Michigan Supreme Court for mandamus, habeas corpus, and leave to appeal.

Third:

For each of the foregoing reasons, the District Court of the United States was without jurisdiction to issue a writ of habeas corpus in this cause or to resolve issues of fact which might arise from the allegations of Collins' petition therefor. The principal question presented is therefore ripe for decision.

VII

The Argument.

First Point

Michigan's jurisdiction to accuse, try, and upon conviction punish Shirley Collins for murder, was not impaired by the alleged misconduct of her over-zealous police officers.

The authorities, based upon decisions of this Court collated in 165 A.L.R. 947, recognize the universal rule

> "that where a person accused of crime is found within the territorial jurisdiction wherein he is so charged and is held under process legally issued from a court of that jurisdiction, neither the jurisdiction of the court nor the right to put him on trial for the offense charged is impaired by the manner in which he was brought from another jurisdiction, whether by kidnaping, illegal arrest, abduction, or irregular extradition proceedings."

1

The doctrine is sustained in an unbroken line of this Court's decisions, followed, with possibly one exception, by federal courts of appeals and by courts of last resort in the several States.

The court below expressed the opinion (16-17) that decisions of this Court in two leading cases,

Ker v. *Illinois*, 119 U.S. 436,
and
Mahon v. *Justice*, 127 U.S. 700,

ceased to control the question involved when the Federal Kidnapping Act, 18 U.S.C. § 1201 presently considered, was enacted in 1932, and that there are further factors distinguishing them from the situation at bar.

In the case of *Ker, supra,* the defendant had been kidnapped in Peru and brought by force against his will within the jurisdiction of the State (Illinois) whose law he had violated, and this Court held in reviewing his conviction, that how far such forcible transfer of the defendant might be set up against the right to try him, was the province of the state court to decide, and presented no question in which this Court could review its decision. Moreover, the due process of law guaranteed by the Fourteenth Amendment,

> "is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. . . . for mere irregularities in the manner in

> which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment. . . . So here, when brought within the jurisdiction of the State of Illinois and liable to answer for a crime against the laws of that State, unless there was some *positive* (emphasis added) provision of the Constitution or of the laws of this country violated in bringing him into court, it is not easy to see how he can say that he is there 'without due process of law,' within the meaning of the constitutional provision."

In *Mahon* v. *Justice, supra,* which followed *Ker,* holding *inter alia* that the Due Process Clause of the Fourteenth Amendment had no bearing upon interstate abduction,[18] this Court established the further principle that no mode is provided by the Constitution and laws of the United States by which a person, unlawfully abducted from one State to another, and held in the latter State under process of law for an offence against the State, can be restored to the State from which he was abducted.

The case of *Lascelles* v. *Georgia,* 148 U.S. 537, brought into focus the status of a fugitive from justice who has been surrendered by one State of the Union to another State, upon requisition charging him the commission of a specific crime, and the Court held that such a person has, under the Constitution and laws of the United States, no

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[18]

The Court said, among other things, "The law of that State which is enforced is a law for the punishment of the crime of murder, and she has merely sought to enforce it by her officers under process executed within her territory. She did not authorize the unlawful abduction of the prisoner from West Virginia," 127 U.S. at 707.

right, privilege or immunity to be exempt from indictment and trial, in the State to which he is returned, for any other or different offence from that designated in the requisition, without first having an opportunity to return to the State from which he was extradited. Following the principles announced in *Ker* and *Mahon* as well as in *Cook* v. *Hart*, 146 U.S. 183, 190, 192, it was said, 148 U.S. at 543:

> "But it is settled by the decisions of this Court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a state for an offence against its laws, from trial and punishment, even though brought from another state by unlawful violence, or by abuse of legal process."

It was largely due to the decision in *Lascelles, supra*, that the Michigan Supreme Court modified earlier decisions,[19] and Nebraska's highest court overruled a case which had stood in that State for many years,

Jackson v. *Olson*, 146 Neb. 885; 22 NW 2d 124, 132; 165 A.L.R. 932, overruling

In re Robinson, 29 Neb. 135.

Later adhering to these principles, the Court, *In re Johnson*, 167 U.S. 120, 125, held that "the law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a

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[19] In re Little, 129 Mich. 454, modifying dictum on the subject In re Cannon, 47 Mich. 481, and in People, ex rel. Watson, v. Judge, 40 Mich. 729. Please see also, People v. Maher, 329 Mich. 155; cert. denied, 340 U.S. 949.

mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest."

Federal courts of appeals, and United States courts of appeals, as constituted since 1948, have followed religiously the *Mahon* and *Ker* decisions in a host of cases almost too numerous to list, though a few are cited in footnote 13, *ante*, by way of illustration, esp., those handed down after enactment of the Federal Kidnapping Act.

Such decisions hold it elementary, 25 Am. Jur., Habeas Corpus, § 34, p. 169, that the return of one from another state, even by force and without formality of extradition procedure, to face criminal charges in the state to which he is returned is not a denial of due process of law,

E.g., *Sweet* v. *Howard, Warden,* 155 F. 2d 715, 717.

This guiding principle has also recently been applied to the jurisdiction of a Federal District Court in cases holding that the personal presence of a defendant gives such a court complete jurdiction over him regardless of how his presence was secured, and the court cannot decline to exercise such jurisdiction.

Stamphill v. *Johnson,* 136 F. 2d 291, 292; cert. denied, 320 U.S. 766;

f. *Chandler* v. *United States,* 171 F. 2d 921 syl. 8; cert. denied, 336 U.S. 918;

Gillars v. *United States,* 182 F. 2d 962, 972.

The vast majority of the state courts of last resort have,

of course, followed the decisions of this Court, Michigan quite recently,

People v. *Mahler*, 329 Mich. 155; cert. denied, 340 U.S. 549.

Such decisions are cited in footnote 14, and they require no further comment.

We respectfully submit that the opinions of this Court expressed in *Ker*, *Mahon*, *Johnson* and *Lascelles*, still control, unaffected by the Federal Kidnapping Act.

2

The principles which guided this Court to the decisions cited above, were not vitiated by the Federal Kidnapping Act.

The Federal Kidnapping Act of 1932, 18 U.S.C. § 1201, as broadened in scope by the amendment of 1934, was, we respectfully submit, never intended to reach and punish as criminals, over-zealous police officers who falsely arrest and transport across state boundaries, those charged with offenses against the laws of the state to which the accused is taken.

That Statute, as we read its provisions, was intended solely as a punitive measure against criminals who like Bruno Hauptman kidnapped, held and killed the Lindberg child.[20] Surely, the decisions cited by the court below do not sustain the contention that the statute was otherwise intended.

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[20]

State v. Hauptmann, 115 N.J.L. 412; cert. denied, 296 U.S. 649.

In *Gooch* v. *United States*, 297 U.S. 124, 128, the Court held that an officer of the law who is unlawfully seized and carried away to prevent the arrest of his captor is "held for . . . reward or otherwise", within the meaning of the Federal Kidnapping Act as amended; and transportation in interstate commerce of the officer while thus restrained constitutes a violation of the Act.

> "Holding an officer to prevent the captor's arrest (said the Court) is something done with the expectation of benefit to the transgressor. So also is kidnapping with purpose to secure money. These benefits, while not the same, are similar in their general nature and the desire to secure either of them may lead to kidnapping. If the word reward, as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, 'otherwise.'"

Speaking for this Court in *Chatwin* v. *United States*, 326 U.S. 455, 464, Mr. Justice Murphy urged against a too broad construction of the Act and said, in part:

> "In short, the purpose of the Act was to outlaw interstate kidnappings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the Act must be interpreted and applied with that plain fact in mind . . . Were we to sanction a careless concept of the crime of kidnapping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity."

Moreover, should the Act be construed to include officers of the law, it still would not apply to this particular case

for the statute does not amend the law governing interstate rendition, nor does it expressly curtail the jurisdiction of State courts to accuse, try and punish those who violate the law of the forum.

While federal law now prescribes punishment for whoever knowingly transports in interstate commerce any person who has been kidnapped, 18 U.S.C. § 1201, and though it exacts the penalty of death whenever maltreatment of the victim is established, it does not necessarily follow, when state police officers forcibly transport against his will an accused person into the territorial confines of a court wherein he is lawfully charged with murder, that consequently the respondent becomes constitutionally immune from prosecution; and certainly no federal statute, including the Kidnapping Act, *supra*, maps procedure to restore the guilty party to the asylum state.

It should go without saying that, if defendant's allegations of fact (2-4) were true, Michigan would never condone the course of misconduct pursued by over-zealous police officers, but this does not mean that if the Federal Kidnapping Act were so violated, the convicted offender against Michigan's law must go free.

If because of acts of Michigan police officers, in violation of federal law, the Michigan trial court forfeited jurisdiction over his person, and should the District Court be required to release him on habeas corpus, Shirley Collins could never be retried and punished for murder until he voluntarily returns to the asylum state of Illinois there to await extradition proceedings; and since there exists no authority under federal or state law to compel such action, he could escape the consequences of his crime by the simple expedient of remaining in Michigan. We doubt very much

that the Congress intended such consequences to flow from a violation of the statute, or that this Court would be inclined to place so loose a construction upon a law designed "to assist the states in stamping out this growing and sinister menace of kidnapping," *Chatwin v. United States*, 326 U. S. 455, 463. Clearly, we think, the Federal Kidnapping Act was not passed for the purpose of strangling the exercise of state sovereignty in bringing criminals to justice. And the penalty of death for the individual suffices to maintain the integrity of federal authority.

3

Shirley Collins, in his trial for murder, was not deprived of his liberty without due process of law.

The respondent was accused of murder under valid process issued from a Michigan court of competent jurisdiction; a warrant executed by a justice of the peace initiated criminal proceedings against him, and Collins was given a preliminary examination to determine whether probable cause existed to bind him over to the circuit court for trial;[21] upon return of the magistrate so certifying, the prosecuting attorney filed in the circuit court his information advising the accused of the nature of the offense charged against him;[22] he had the advice and assistance of competent counsel throughout the entire course of magisterial and trial procedure, and final conviction came from a

[21]

Michigan Comp. Laws 1948, § § 766.1, 766.3, 766.4, 766.13; Mich. Stat. Ann. (Henderson) § § 28.919, 28.921, 28.922 and 28.931.

[22]

Mich. Comp. Laws 1948, § 767.40; Mich. Stat. Ann. (Henderson) § 28.980.

fair and impartial jury;[23] there is no claim on his part that during the trial he was denied any fundamental right essential to justice and therefore guaranteed by the Due Process Clause of the Fourteenth Amendment. Thus, the constitutional rights of the accused have been fully safeguarded, and by his conviction and sentence, following a fair trial, Michigan's sovereignty has been upheld.

Second Point

Since Collins failed to show he had "exhausted the remedies available in the courts of the State," and did not plead exceptional circumstances of peculiar urgency sufficient to warrant prompt federal action, he was not entitled to the writ, 28 U.S.C. § 2254.

The petitioner in *Darr v. Burford*, 339 U.S. 200, a state prisoner, applied to a Federal District Court for habeas corpus and was denied the writ for his "omission to apply here for certiorari from the state court's denial of habeas corpus." This Court, deeply concerned, held, upon authority of *Ex Parte Hawk*, 321 U.S. 114, that ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts, have been exhausted and review has been denied by this Court, and that in § 2254 of the 1948 recodification of the Judicial Code, Congress accepted the rule of the *Hawk* case as a sound rule to guide consideration of habeas corpus in federal courts.

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[23] Mich. Const., Article II, § 19.

Further, it was decided, p. 219, the petitioner had not sustained the burden of showing that circumstances of peculiar urgency existed to require prompt federal intervention.

The narrow and perplexing question involved in *Darr v. Burford, supra*, is not here presented for consideration, for in the case at bar the applicant for habeas corpus has taken advantage of no remedy offered him by the State of Michigan.

As recognized by this Court,[24] as well as the United States Court of Appeals for the Sixth Circuit,[25] Michigan's corrective process where claims of constitutional infringement are made, comprises a delayed motion for new trial and in the event of an adverse decision, an application for leave to appeal to the state's highest court. But the defendant did not choose to exercise that privilege for the purpose of asserting his present contention.

1

In his petition for habeas corpus (1-3), filed in the Federal District Court 8 years after his conviction for murder, Collins fails to allege that he had a trial by jury, with full benefit of counsel, or that he raised a challenge to the trial court's jurisdiction or that he moved for a new trial on that ground, or that he appealed to the Michigan Supreme Court on the basis of official violation of the Federal Kidnapping Act.

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[24] De Meerleer v. Michigan, 329 U.S. 663.

[25] Whalen v. Frisbie, 185 F. 2d 807.

It appears from the petition (22-25) for rehearing and other relief, filed in the court below, however, that Shirley Collins has never by motion for new trial or otherwise raised in the courts of Michigan the question of jurisdiction presented in his petition for habeas corpus (22).

While Michigan has been extremely liberal in permitting a dilatory motion for new trial to be filed, especially where constitutional questions are involved, *Whalen v. Frisbie*, 185 F. 2d 607, or where it is asserted that in the trial of one sentence to a long term of imprisonment, a fundamental right has been abridged, *De Meerleer v. Michigan*, 329 U.S. 663, *Quicksall v. Michigan*, 339 U.S. 660, the Supreme Court of that State might *possibly* feel that in the case at bar it would be stretching the privilege beyond reasonable bounds to permit the filing of such a delayed motion for the purpose of raising an objection to the jurisdiction of the trial court which should in all conscience have been interposed at the threshold of the circuit court.

In the recent case of *People v. Maher*, 329 Mich. 155, cert. denied 340 U.S. 949, it will be noted from a perusal of the record on file in this Court, No. 325 Miscel. October Term 1950, that on motion of the State the cause was remanded to the circuit court for the purpose of taking further testimony concerning defendant's claim that he had been kidnapped in Indiana and brought across state boundary lines into Michigan to face trial for murder. The trial judge, finding no support in evidence for defendant's claim, and giving him no credence, denied the motion. The Supreme Court affirmed, holding as a matter of law based upon this Court's decisions in *Ker* and *Lascelles*, *supra*, there was no merit to defendant's claim, stating at the same time that "furthermore, the record amply supports the trial court's finding that defendant came into this State voluntarily."

In the case of *Mahler*, however, a plea of guilty was accepted shortly after the defendant's return to Michigan from Indiana, and the Supreme Court, as well as the trial judge, probably felt that the facts and circumstances surrounding the arrest, the transportation of the defendant from Indiana to Michigan, and his subsequent conviction on plea of guilty, should be subjected to close judicial scrutiny.

Here, in the case of Collins, the defendant had counsel at all times and pled not guilty to the information filed against him in circuit court. He interposed no motion to quash the information on the ground that the trial court lacked jurisdiction because of illegal transportation into the State, following kidnapping in Illinois, and he waited 8 years before he raised the question in a Federal Court. It might well be held, we think, that the matter of procedure is controlled, so far as Michigan courts are concerned, by

In re Reno, 321 Mich. 497,

where it was held that the defendant, by pleading guilty to an offense properly charged in the information, thereby waived defects in the complaint and warrant, and that after entry of a plea in the circuit court the prior proceedings had before an examining magistrate cannot be questioned nor can the defendant then complain even though there has been no examination.

2

It further appears (23) that although Collins has on several occasions applied to the Supreme Court of the State of Michigan for writs of mandamus, for leave to appeal, and for a writ of habeas corpus, he has never invoked these remedies on the ground that the trial court lacked jurisdiction to try him for the criminal offense of murder, by virtue of the alleged fact that he had been kidnapped by Michigan police officers and transported in interstate commerce contrary to Federal law. A complete summary of such state proceedings will be found in the printed transcript of the record (23-29).

We respectfully submit that in the circumstances disclosed by the record it cannot be said that the defendant Collins has met the burden of pleading or proving the existence of exceptional circumstances of peculiar urgency which require prompt federal intervention, *Darr v. Burford, supra*, 339 U. S. 200.

Surely when, as in this cause, an accused person neglects through his counsel promptly to raise the question of jurisdiction in the initial stages of his prosecution, or during the course of his trial by jury, or in a motion for new trial or on appeal to the State Supreme Court, and when, as here, he allows 8 years to elapse before asserting such a claim, there exists no emergency.

There remains our duty to inform the Court, although the fact does not appear in the present record, that upon remand of this cause from the court of appeals to the district court, a hearing was held, witnesses were produced, testimony was given on both sides, and the issue of fact, whether the police officers kidnapped Collins and trans-

ported him into the state, is about to be resolved by the federal court.

This does not, however, we respectfully submit, render moot the questions here presented, for it is our position that the District Court is without power or authority to resolve such issues of fact unless or until it clearly appears that all state remedies have been exhausted by the defendant.

In short, it is our firm belief that the vital question before this Court at the present time, involves Michigan's sovereignty exercised in bringing to justice persons accused of criminal offenses, and in providing adequate remedies for the correction of errors committed by her courts.

Unless Michigan is to lose such sovereign powers entirely, it is for her courts to resolve the issues of fact in this case.

Third Point and Conclusion.

For each of the foregoing reasons, the District Court of the United States was without jurisdiction to issue a writ or resolve issues of fact thereon.

We take the firm position that under the authority of those decisions of this Court cited so often in our brief, the District Court was without any jurisdiction to resolve issues of fact, and its power was exhausted when it held that the illegal arrest of Collins by Michigan police officers, followed by transportation from Illinois to Michigan to face trial in the latter State, did not diminish or impair the jurisdiction of the circuit court to try him for murder. Such issues of fact, if deemed pertinent, should be resolved by Michigan courts.

It is most respectfully urged that the order of the United States Court of Appeals for the Sixth Circuit, remanding the cause to the District Court, should be reversed.

Respectfully Submitted,

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